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IN THE

Supreme Court of the United States

No. 71-1041

EMIL P. TAXAY, M.D.,

Petitioner,

v.

JOHN H. SHAFFER, Administrator of the Federal Aviation Administration;

PETER V. SIEGEL, M.D., Federal Air Surgeon, Federal Aviation Administration;

HARRY M. FAULKNER, M.D., Regional Flight Surgeon, Southern Region, Federal Aviation Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

EMIL P. TAXAY, M.D.,

Petitioner,

v.

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HARRY M. FAULKNER, M.D., Regional Flight Surgeon, Southern Region, Federal Aviation Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, EMIL P. TAXAY, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, dismissing his petition for review of an action of the Federal Aviation Administration, entered in this proceeding on November 16, 1971.

JUDGMENT BELOW

The order and judgment of the Court of Appeals, as yet unreported, appears at Appendix A to this petition.

JURISDICTION

The order and judgment of the United States Court of Appeals for the District of Columbia Circuit (Appendix A to this petition), was entered without opinion on November 16, 1971. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals has jurisdiction to review the action of the Federal Aviation Administration whereby Petitioner was denied renewal of his designation as an Aviation Medical Examiner.

STATUTORY AND RULES PROVISIONS INVOLVED

This case involves Section 314(a) of the Federal Aviation Act of 1958, 72 Stat. 754, 49 U.S.C. 1355(a); Section 1002 (a) of the Federal Aviation Act of 1958, 72 Stat. 788, 49 U.S.C. 1482(a); and Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486.

These are reprinted in pertinent part in Appendix B to this petition.

STATEMENT OF FACTS

Petitioner, Emil P. Taxay, M.D., is a physician practicing medicine in Coral Gables, Florida. Dr. Taxay was initially designated by the Administrator of the Federal Aviation Administration to act as a Senior Aviation Medical Exam-

iner (AME) in August, 1961. His designation was renewed annually and he served as an AME until March 30, 1970.

By letter dated March 25, 1970, Respondent Harry W. Faulkner, M.D., Regional Flight Surgeon of the Southern Region of the Federal Aviation Administration (FAA), informed Petitioner that "it would not be in the best interest of the Federal Aviation Administration to reappoint" him as an Aviation Medical Examiner.[1] No further explanation of your Petitioner's dismissal as an AME was offered at this time.

In reply to inquiry as to the basis for the dismissal, Regional Counsel to the Southern Region of the FAA, J. N. Coker, Esq., advised counsel for Petitioner that "it is believed that you [counsel] and Dr. Taxay are aware of the reasons for such determination."[2] Counsel for Petitioner pursued his inquiry and was advised by Mr. Coker on April 20, 1970,[3] that Petitioner was refused redesignation as an AME because he had appeared as an expert medical witness at hearings of the National Transportation Safety Board in opposition to positions taken by the Administrator, and because he had consulted on individual cases with legal counsel for airmen.

By letter of April 24, 1970,[4] Respondent Peter V. Siegel, M.D., Federal Air Surgeon, stated that the refusal to redesignate your Petitioner was engendered by Dr. Taxay's cooperation with airmen. Respondent Shaffer, by letter dated June 16, 1970,[5] restated the position of the FAA in dismissing your Petitioner.

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[1] Appendix C, *infra*, p. 13c

[2] Appendix C, *infra*, p. 14c

[3] Appendix C, *infra*, p. 15c

[4] Appendix C, *infra*, p. 16c

[5] Appendix C, *infra*, p. 17c

Petitioner's counsel sought an opportunity to present information to the FAA,[6] and his request was denied on June 10, 1970.[7]

In an effort to exhaust all avenues of administrative review before pursuing court action, on July 8, 1970, Petitioner complained under the apparent authority of §1002[8] of the Federal Aviation Act of 1958, seeking reversal of the refusal to redesignate, or, in the alternative, an investigation by way of evidentiary hearing in order to make a record.[9]

Respondent Shaffer referred the complaint to an independent office, and, by letter dated October 23, 1970,[10] advised Petitioner's counsel of his conclusion that there was no reasonable basis for reversal of the decision of Drs. Siegel and Faulkner, and that he was of the further opinion that the complaint did not contain facts which would warrant further investigation.

On February 16, 1971, your Petitioner sought review by the Court of Appeals of Mr. Shaffer's final administrative determination, in accordance with the provisions of §1006 of the Federal Aviation Act of 1958.[11]

In another matter, the Court of Appeals for the District of Columbia Circuit, by opinion dated April 14, 1971, held that the assertion made by the Administrator of the FAA, that a complaint filed against him under §1002 of the Federal Aviation Act[12] is outside the scope of the complaint

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[6] Appendix C, *infra*, p. 18c

[7] Appendix C, *infra*, p. 24c

[8] Appendix B, *infra*, p. 1b

[9] Appendix C, *infra*, p. 2c

[10] Appendix C, *infra*, p. 1c

[11] Appendix B, *infra*, p. 2b

[12] Appendix B, *infra*, p. 1b

provision, does not constitute an "order" reviewable by the Court of Appeals under § 1006 of that Act[13] (*International Navigators Council of America v. Shaffer*, 444 F.2d 904 [D.C.Cir. 1971]).

In its order and judgment in this proceeding, dated November 16, 1971, the Court of Appeals dismissed your Petitioner's complaint without opinion,[14] based upon its decision in *International Navigator's Council of America v. Shaffer*.[15]

REASONS FOR GRANTING THE WRIT

A. THE ACTION OF RESPONDENTS IN REFUSING REDESIGNATION OF PETITIONER AS AN AME CONSTITUTES AN "ORDER" REVIEWABLE UNDER SECTION 1006 OF THE FEDERAL AVIATION ACT OF 1958:

As noted above, Petitioner sought reconsideration of the Administrator's decision of dismissal by filing a complaint under Section 1002 of the Federal Aviation Act of 1958.[16] The complaint requested reversal of the refusal to redesignate or, in the alternative, an investigation by way of evidentiary hearing. The filing of this complaint with the Federal Aviation Administrator was a good faith effort on the part of Petitioner to exhaust his administrative remedies before seeking the assistance of the courts. The filing of both the complaint and the petition for review of the FAA's refusal to redesignate Petitioner took place prior to the decision issued by the Court of Appeals for

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[13] Appendix B, *infra*, p. 2b

[14] Appendix A, *infra*.

[15] *Supra*.

[16] Appendix B, *infra*, p. 1b

the District of Columbia in *International Navigators Council of America v. Shaffer*.[17] Thus, Petitioner was without the benefit of the Court's interpretation of Section 1002 in that case when he filed his original complaint and the action in the Court of Appeals.

In *International Navigators Council of America v. Shaffer (INCA)*, the Plaintiff had filed a complaint under Section 1002 of the Federal Aviation Act of 1958, alleging violation of that Act by the Administrator in failing to issue certain regulations, among other things. The Administrator determined that the complaint was inappropriately filed under Section 1002, and treated the complaint as a petition for rulemaking. Plaintiff sought review by the Court of Appeals of the disposition of his complaint, alleging that the disposition constituted an "order" reviewable by that Court under Section 1006 of the Federal Aviation Act. The Court dismissed the action, holding that the determination made by the Administrator as to the disposition of the complaint was not a reviewable "order" under Section 1006.

In a sense, the Complainant in the *INCA* case was endeavoring to manufacture jurisdiction where none had existed. Your Petitioner, however, seeks judicial review of the decision of the Administrator to not redesignate Petitioner as an Aviation Medical Examiner. Although it is true that Petitioner filed a complaint under Section 1002, it is not the disposition of that complaint which the Petitioner seeks to be reviewed by the courts, but rather, the basic decision not to redesignate. It is the contention of your Petitioner that the action of the Federal Aviation Administration, as carried out by the Regional Flight Surgeon, the Regional Counsel, the Regional Director, the Federal Air Surgeon and the Administrator, constituted an "order" reviewable by the Court of Appeals for the District of Columbia Circuit under Section 1006 of the Federal Aviation Act.[18]

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[17] *Supra*, p. 5

[18] Appendix B, *infra*, p. 2b

The action of the FAA fits the definition of a reviewable order as expressed by the Court of Appeals for the District of Columbia Circuit in a number of its recent cases.[19] The test to which that Court has subscribed might be summarized as whether the administrative action operates with final effect upon a particular individual entity or group.[20] There can be no doubt that the action of respondents has had a final affect on Petitioner. His designation as an Aviation Medical Examiner clearly has been terminated by the officials of the Federal Aviation Administration, and in particular, the Administrator, who has the final or ultimate authority under the Regulations which govern.[21]

Your Petitioner respectfully submits that his good faith efforts to exhaust his administrative remedies should not preclude judicial review of the action whereof he was complaining. The interpretation of Section 1002 rendered by the Court of Appeals in the *INCA* case led to the dismissal of that Complainant's efforts to create jurisdiction by a "bootstrap" method where jurisdiction did not already exist. The interpretation of Section 1002 of the Federal Aviation Act of 1958 should not be so broadened by the Court of Appeals as to embrace all situations in which a person files a complaint under that Section, whether mistakenly or otherwise. In the Petitioner's situation, it is submitted that the substance of the action of which he complained should determine the applicability of the jurisdictional section of the Federal Aviation Act, and not the

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[19] *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Medical Committee for Human Rights v. Securities and Exchange Commission*, 432 F.2d 659 (D.C. Cir. 1970); *Pan American World Airways, Inc. v. Civil Aeronautics Board*, 392 F.2d 483 (D.C. Cir. 1968).

[20] *Ibid.*

[21] Section 183.15 of the Federal Aviation Regulations (14 CFR 183.15), Appendix B, *infra*, p. 4b

form of his complaint.[22] The action by the Respondents in all respects meets the definition of a reviewable order and, therefore, should be subject to review by the Court of Appeals despite the fact that Petitioner, in the course of his efforts to seek reconsideration of his dismissal, filed a complaint under the apparent authority of Section 1002.

B. DUE PROCESS OF LAW REQUIRED A HEARING AT SOME STAGE OF THE PROCEEDING AT THE ADMINISTRATIVE LEVEL.

In dismissing Petitioner's action, the Court of Appeals rejected the argument that Section 314 of the Federal Aviation Act of 1958[23] does not supplant the constitutional right of due process under the Fifth Amendment of the Constitution.[24] Section 314(a) pertains to the authority of the Federal Aviation Administrator to properly qualify private persons to perform any work, business or function respecting examination, inspection and testing necessary to issuance of certificates, including airman medical certificates. That Section states in part that the Administrator "may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate."

Petitioner contended before the Court of Appeals that Section 314 did not give the Administrator of the FAA authority to rescind delegations made by him without regard to the due process clause of the Constitution. Your Petitioner contends here that the rejection of this argument by the Court of Appeals raises a substantial federal ques-

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[22] See *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 416 (1942); *American Federation of Labor v. NLRB*, 308 U.S. 401, 408 (1940); *Powell v. U.S.*, 300 U.S. 276, 285 (1937).

[23] Appendix B, *infra*, p. lb

[24] Constitution of the United States, Amendment V.

tion in the interpretation of Section 314 of the Federal Aviation Act.[25]

A case directly in point is *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1925). In that case, Goldsmith, a Certified Public Accountant, applied for admission to practice before the Board of Tax Appeals. The Board's rules made eligible for admission any attorney at law admitted to any Federal or State Court in the United States as well as any duly qualified C.P.A. The rules went on to require that an applicant give an oath, provide his name, residence, qualification information and whether he had been disbarred or had had his certification revoked. The rules further stated that the "Board may, in its discretion, deny admission to any applicant, or suspend or disbar any person after admission." Goldsmith applied, was denied, and filed an action seeking mandatory relief. Simply stated, the issues before the Court were whether Goldsmith was qualified to apply and whether the discretion alluded to in the Board's rules would obviate the necessity for a trial-type hearing. The Supreme Court found Goldsmith qualified and found that the Board's action had deprived him of due process of law. The Court said:

> "[T] he Board may, in its discretion, deny admission, suspend or disbar any person." But this *must* be construed to mean the exercise of a discretion to be exercised after a fair investigation, with such notice, hearing and opportunity to answer for the applicants as would constitute due process. (*Goldsmith, supra*, at p. 123, emphasis supplied.)

That this case is appropriate for consideration on these facts is a foregone conclusion. What makes it stronger is that the Goldsmith case dealt with promulgated rules. In the instant situation, there are none. As was Goldsmith, Petitioner is qualified to serve in the position which he

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[25] Appendix B; *infra*, p. 1b

seeks. He has been serving the Administrator well in that capacity for almost nine years, yet the Administrator has made a wholly discretionary and, it is submitted, arbitrary decision to refuse renewal of his designation without affording Petitioner notice of the charges against him or the opportunity to answer those charges at a hearing, and without supporting his decision with substantial evidence.

The charge against Petitioner that is stated as the cause for which the Administrator refused to renew Petitioner's designation is a serious one. He is charged with professional dishonesty, for he is charged with placing himself in a conflict of interest situation. There are serious professional ramifications to this charge, as well as economic impact. He has been given no chance to face his accusers, offer explanations, discuss facts, cross-examine witnesses or present witnesses in his own behalf. He was merely given the opportunity, through counsel, to write a letter to an attorney in the Administrator's office, setting forth some portion of his side of the story. In exchange he received a cursory note from the Federal Air Surgeon.[26] Petitioner has never had his say and is being deprived of due process of law.

The Court's attention is respectfully directed to a thorough exposition of the law on the subject matter at hand. We have reference here to K. Davis, *Requirement of a Trial Type Hearing*, 70 Harvard Law Review 193 (1956). Professor Davis, in this exhaustive work, covers the case law up until 1956 on this point. For the purpose of aiding the Court in further exploring the law, the Court's attention is further directed to the cases of *Crocker v. U.S.*, 127 F.Supp. 568 (Ct. Cl. 1955); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); *Minkoff v. Payne*, 93 U.S. App. D.C. 123, 210 F.2d 689 (D.C.Cir. 1953); *Columbia Auto Loan v. Jordan*, 90 U.S.App. D.C. 222, 196 F.2d 568 (D.C.Cir. 1952); *Wieman v. Undergraff*, 344 U.S. 183

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[26] Appendix C, *infra*, p. 24c

(1952); *In re Carter*, 89 U.S. App. D.C. 310, 192 F.2d 15 (1951), cert. denied 342 U.S. 862; *In re Carter* 85 U.S. App. D.C. 229, 177 F.2d 75 (1949); *Bratton v. Chandler*, 260 U.S. 110 (1922).

The Fifth Circuit has offered a brief course on due process in administrative proceedings at page 608 of its opinion in *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). The court stated that:

> Due process in administrative proceedings of a judicial nature has been said generally to be conformity to fair practices of Anglo-Saxon jurisprudence (see *Tadano v. Manney*, 160 F.2d 665, 667 [9th Cir. 1947]), which is usually equated with adequate notice and a fair hearing (see *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 [1941]). Although strict adherence to the common law rules of evidence at the hearing is not required, . . . the parties must generally be allowed an opportunity to know the claims of the opposing party (*Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 [1938]), to present evidence to support their contentions (see id. 304 U.S. at 18, 58 S.Ct. at 776, 82 L.Ed. 1129), and to cross-examine witnesses for the other side (*Reilly v. Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 [1949]).

It is submitted that examination of the facts of Petitioner's case reveals that the Administrator has observed none of these elements of administrative due process in his handling of the matter.

Petitioner herein adopts the position stated by the Supreme Court in *Morgan v. U.S.*, 304 U.S. 1 (1938), wherein it was stated:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of adminis-

> trative action and that in an administrative proceeding of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. (*Morgan, supra*, at 14-15.)

The *Morgan* Court found that these fundamentals of fair play demand a fair and open hearing to assure both the legal validity of, and public confidence in, the value and soundness of the administrative process. The Court described a hearing held under these circumstances as an "inexorable safeguard" (*Morgan, supra*, at 14). Petitioner submits that such a safeguard is essential to his case as well.

Petitioner respectfully submits that the decision of the Court of Appeals for the District of Columbia Circuit dismissing this case for lack of jurisdiction grants the Administrator of the FAA absolute discretion, unfettered by the requirements of the Fifth Amendment of the Constitution, as interpreted by this Court, to rescind a designation made under §314 of the Federal Aviation Act. This reading of §314 raises an obvious federal question of considerable import which should be decided by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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February 14, 1972

APPENDIX A

[Filed November 16, 1971]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[no opinion]

September Term, 1971

EMIL P. TAXAY, M.D.,

Petitioner

v. No. 24,837

JOHN H. SHAFFER,
Administrator of the
Federal Aviation
Administration, et al.,

Respondents

Petition for Review of an Order of the
Federal Aviation Administration

Before: DANAHER, Senior Circuit Judge, and MCGOWAN and TAMM, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Aviation Administration, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the petition for review herein is hereby dismissed for lack of jurisdiction. *See International Navigators Council of*

America v. Shaffer, ___ U.S. App. D.C. ___, 444 F. 2d 904 (1971).

Per Curiam.

Dated: November 16, 1971

APPENDIX B

SECTION 314(a) OF THE FEDERAL AVIATION ACT OF 1958, 49 U.S.C.

§1355. Delegation of Powers and Duties to Private Persons; Application for Reconsideration

(a) In exercising the powers and duties vested in him by this chapter, the Administrator may, subject to such regulations, supervision, and review as he may prescribe, delegate to any properly qualified private person, or to any employee or employees under the supervision of such person, any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under subchapter VI of this chapter, and (2) the issuance of such certificates in accordance with standards established by him. The Administrator may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate.

SECTION 1002(a) OF THE FEDERAL AVIATION ACT OF 1958, 49 U.S.C.

§1482. Complaints to and Investigations by the Administrator and the Board—Filing of Complaints; Complaints Against Members of the Armed Forces

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administra-

tor or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

SECTION 1006 OF THE FEDERAL AVIATION ACT OF 1958, 49 U.S.C.

§1486. Judicial Review—Orders Subject to Review; Petition for Review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Record

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Conclusiveness of Findings of Fact; Objections

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Review by Supreme Court

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

SECTION 183.15 OF THE FEDERAL AVIATION REGULATIONS (14 CFR 183.15).

§183.15 Duration of Certificates.

(a) Unless sooner terminated under paragraph (c) of this section, a designation as an Aviation Medical Examiner is effective for 1 year after the date it is issued, and may be renewed for additional periods of 1 year in the Federal Air Surgeon's discretion. A renewal is effected by a letter and issuance of a new identification card specifying the renewal period.

(b) Unless sooner terminated under paragraph (c) of this section, a designation as a Flight Standards Designated Representative is effective for one year after the date it is issued and may be renewed for additional periods of one year in the Administrator's descretion.

(c) A designation made under this subpart terminates–

(1) Upon the written request of the representative;

(2) Upon the written request of the employer in any case in which the recommendation of the employer is required for the designation;

(3) Upon the representative being separated from the employment of the employer who recommended him for certification;

(4) Upon a finding by the Administrator that the representative has not properly performed his duties under the designation;

(5) Upon the assistance of the representative being no longer needed by the Administrator; or

(6) For any reason the Administrator considers appropriate.

APPENDIX C

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C. 20590

October 23, 1970

Robert D. Powell, Esquire
Smith, Pepper, Shack and L'Heureux
1776 K Street, N.W.
Washington, D.C. 20006

Re: *The Matter of the Complaint of Emil P. Taxay, M.D.*

Dear Mr. Powell:

This is in reply to the Complaint of 8 July 1970 filed by you concerning action taken by the Federal Aviation Administration declining to redesignate Emil P. Taxay, M.D., as an Aviation Medical Examiner.

Upon receipt of the Complaint, we caused it to be referred for consideration by an Office unrelated to either the Office of Aviation Medicine or the Office of the General Counsel. That Office has furnished to us, and we have reviewed, their independent evaluation and recommendation concerning the action taken by Dr. Peter V. Siegel, M.D., the Federal Air Surgeon, and Dr. Harry Faulkner, M.D., Regional Flight Surgeon, Southern Region, under authority delegated to them. From a review and consideration of both the Complaint and the report, we have concluded that there does not exist any reasonable basis for reversal of the decision made by Dr. Siegel and Dr. Faulkner not to redesignate Dr. Taxay.

As we are of the opinion that the Complaint does not contain facts which would warrant further investigation, we therefore consider this matter dismissed without the necessity for additional action.

Sincerely, J.H. Shaffer, Administrator

COMPLAINT

Comes now Emil P. Taxay, M.D. (hereinafter "Plaintiff"), by his attorneys, and files this Complaint, pursuant to Section 1002(a) of the Federal Aviation Act of 1958, as amended, against John H. Shaffer, Administrator of the Federal Aviation Administration; Peter V. Siegel, M.D., Federal Air Surgeon of the Federal Aviation Administration; and Harry V. Faulkner, M.D., Regional Flight Surgeon for the Southern Region of the Federal Aviation Administration.

1. Plaintiff is currently practicing medicine in Miami, Florida. He is a Diplomate of the American Board of Internal Medicine and specializes in both internal medicine and cardiology. Plaintiff sees approximately 150 patients a week, about 15 per cent of whom are pilots. He is on the staff of four hospitals in the Miami area. He has served on the faculty of the University of Miami School of Medicine, both as an instructor and assistant professor. Plaintiff holds memberships in a number of local, national and international medical associations and has published over twenty articles in medical journals. He served four years active and nine years reserve duty as a flight surgeon with the U.S. Air Force. Plaintiff's academic record is excellent. He entered the University of Cincinnati at age fifteen, graduated at age eighteen, and received a Master's degree in chemistry at age nineteen. He then entered medical school at Cincinnati and graduated in 1954. He was honored by receiving an internship at Walter Reed Army

Hospital, a much coveted position. A copy of Plaintiff's *curriculum vitae* is attached hereto as Attachment A.

2. Plaintiff was originally designated as a Senior Aviation Medical Examiner (AME) by the FAA on August 7, 1961. In this capacity he has examined approximately 100 airmen a year to determine their qualifications for medical certification under Part 67 of the Federal Aviation Regulations. Plaintiff cannot recall any occasion during the time since his designation when he was advised by the FAA that his work was unsatisfactory. In fact, Plaintiff has been praised by FAA officials for his work as an AME (see Attachment B). To his credit, Plaintiff has attended all required refresher courses in aviation medicine and for several years has voluntarily participated in the FAA–sponsored Air Traffic Control Program and the FAA–sponsored Accident Investigation Program.

3. On March 29, 1970, Plaintiff received a letter from Dr. Harry Faulkner, Regional Flight Surgeon for the Southern Region of the Federal Aviation Administration, dated March 25, 1970, notifying Plaintiff that his designation as an AME would not be renewed and that his function as such would terminate as of March 30, 1970 (see Attachment C). Dr. Faulkner stated that he had reviewed Plaintiff's record of activity as an AME and that "it would not be in the best interests of the Federal Aviation Administration to reappoint [him] as an Aviation Medical Examiner." No other reason was given.

4. On March 30, 1970, Plaintiff engaged the undersigned, Robert D. Powell, Esq., to aid him in attempting to regain his designation. On April 6, 1970, Mr. Powell, on behalf of Plaintiff, wrote to Dr. Peter V. Siegel, Federal Air Surgeon for the Federal Aviation Administration, to request reconsideration of Dr. Faulkner's action (see Attachment D). On April 7, 1970, Mr. Powell wrote to Dr. Faulkner requesting a definite statement of the reasons for Dr. Faulkner's refusal to redesignate Plaintiff (see Attachment E). Mr. Powell's letter to Dr. Faulkner was referred to

J.N. Coker, Esq., Regional Counsel for the Southern Region of the Federal Aviation Administration, for reply. In response to the request for a definite statement of reasons, Mr. Coker replied: "It is believed that you and Dr. Taxay are aware of the reasons for such determination." (see Attachment F).

5. On April 13, 1970, Mr. Powell wrote to Mr. Coker to again request specific reasons for Dr. Faulkner's refusal to redesignate as Mr. Coker's first letter was deemed an insufficient explanation (see Attachment G). Mr. Coker responded to this further request by letter dated April 20, 1970 (see Attachment H). His letter was brief, considering the gravity of the action taken, and contained misinterpretations of the situation involved. In the second paragraph of his letter, Mr. Coker implies that Plaintiff has appeared in National Transportation Safety Board proceedings on contested medical certification cases as an expert witness in opposition to the FAA while characterizing himself as a representative of the Administrator. This is simply untrue, as an impartial review of the facts would clearly show. Further, Mr. Coker states that Mr. Powell has used, and is using, Plaintiff as a consultant "in opposing the Administrator" in contested cases. This statement is also a half-truth, the unfavorable implications of which can easily be dispelled by an examination of Plaintiff's dealings with Mr. Powell.

6. Dr. Siegel exhibited this same attitude in his letter to Mr. Powell dated April 24, 1970 (see Attachment I). There he stated: "I do not need to go into great detail with you since you know that it is difficult for an individual to both serve as a representative of the Administrator and as a representative against the Administrator." Dr. Siegel also wrote to Plaintiff on April 24 and charged him with serving on a regular basis as a paid consultant to attorneys opposing the Administrator (see Attachment J). Clearly, Dr. Siegel has charged Plaintiff with a conflict of interest, an ethical consideration that questions Plaintiff's fitness to serve as an

AME. Dr. Siegel's statement that such a charge is no reflection on Plaintiff is untrue; it is clearly a reflection on, and impugnation of, Plaintiff's professional ethics and character.

7. The Federal Aviation Administration has expanded on its position with regard to Plaintiff in letters directed to United States Senators who had inquired about the situation at Plaintiff's request. On April 9, 1970, James Rogers, Director of the Southern Region for the Federal Aviation Administration, wrote to the Honorable Spessard L. Holland (see Attachment K). Mr. Roger's letter is a classic example of the use of half-truths and innuendo that is damaging to Plaintiff's professional reputation. In paragraph 4, Mr. Rogers berates Plaintiff for aiding Mr. Powell in developing a case against the Administrator in the instance of a pilot whom "the Administrator does not feel is qualified" for medical certification. This pilot is not identified by Mr. Rogers, but Plaintiff believes he knows to whom Mr. Rogers is referring. Plaintiff's sole activity in this case was performance of a physical examination and a flight test, after which he denied the pilot certification because of the Administrator's expressed position on the case, forwarding the results of the examination to the Regional Flight Surgeon for further action. To date, the Regional Flight Surgeon and the Federal Air Surgeon have not acted on this case. Mr. Rogers cannot be heard to complain of this type of activity which was strictly "by the book." Mr. Rogers goes on in paragraph 4 to state that Plaintiff has disagreed with the Administrator's action in certain cases. This statement is another example of misinterpretation by representatives of the Administrator. Plaintiff has appeared for pilots in two cases before the National Transportation Safety Board. In one, the chief witness for the Administrator agreed with Plaintiff's position; in the other, Plaintiff appeared and offered a medical explanation for loss of consciousness suffered by a pilot who had been denied certification by the Administrator, for disturbance of consciousness without satisfactory medical explanation. In

neither case, could Plaintiff be charged with disagreeing with the Administrator. Further, in paragraph 5, Mr. Rogers engages in a characterization of Plaintiff's ethics that is unsupported by fact and that is slanderous in its implications. The import of Mr. Roger's letter is the charge that Plaintiff has engaged in a conflict of interest situation and has actively sought to undercut the authority of the Administrator. This charge is supported, not by fact, but by suggestion, and must fall before an impartial review of Plaintiff's activities as an AME. The Administrator himself responded to an inquiry from the Honorable Edward J. Gurney, United States Senator, in a letter dated June 16, 1970 (see Attachment L). For the most part, his letter is couched in general terms with all the earmarks of a statement of policy. For instance, the Administrator equates AME's with employees of the Administration and states that the policy of the Department of Transportation is to forbid employees and AME's from taking "positions adverse to the Department in legal proceedings between the Department and third parties." (Paragraph 2). An AME is in a position analogous to that of an employee, he states, because an AME receives "a certain amount of training and information and becomes privy to FAA's views on medical facts critical to its decisions." The Administrator concludes that this relationship involves a degree of trust and confidence. (Paragraph 2). He goes on to say that because individual and public interest often collide in the area of airman medical certification, no man can essentially occupy both sides (paragraph 3) and, according to the Administrator, this is exactly what Plaintiff has done "as an organized course of conduct." (Paragraph 4). This one sentence is the only specific reference to Plaintiff in the Administrator's entire letter. However, it is interesting to note that the Administrator would not object to an AME "occasionally taking an applicant's side in proceedings before FAA when he feels conscientiously impelled to do so in the interest of individual justice." (Paragraph 4). Plaintiff

submits that an impartial review of the facts of his case would reveal that he has done no more than what the Administrator considers acceptable.

8. Plaintiff strongly disagrees with the position taken by the Administrator and his authorized representatives in the handling of the matter and believes that all the facts of his involvement in airmen medical cases have not been considered or that an unfair interpretation has been placed upon them. In an effort to present his "side of the story" Plaintiff authorized Mr. Powell to request a meeting with Dr. Siegel or his representative. Although this request was made on two separate occasions (see Attachments D and M), no such meeting ever took place. However, Mr. Powell did attempt to present Plaintiff's position at a meeting requested by Mr. Jennings Roberts, Associate General Counsel of the Operations and Evaluation Branch of the Federal Aviation Administration and held at Mr. Roberts' offices. Present were Mr. Roberts, Mr. John John Marsh, also of the Office of General Counsel, Mr. Powell and Mr. Robert Buenzle, Mr. Powell's associate. It is interesting to note that Mr. Roberts' stated reason for requesting this meeting was to discuss possible legal action which Plaintiff might bring against the Federal Aviation Administration. Its main purpose was not to present Plaintiff's position, nor was the Federal Aviation Administration prepared to discuss in detail its reasons for refusing to renew Plaintiff's designation. Rather, Mr. Roberts indicated that it was the Federal Aviation Administration's wish to put an end to AME's participation in any aviation medical case from a position favoring a pilot, except under subpoena. Mr. Roberts indicated that it was the Administration's aim to deny a pilot the assistance of a physician skilled and recurrently trained in aviation medical matters. This type of expertise was to be retained by the Federal Aviation Administration alone so that the Administration would be able to win more cases at the hearing level. This is similar to the position later taken by the Administrator in his letter to Senator Gurney and discussed, *supra*. A

more reasonable position was taken by Mr. Marsh who thought that what was being complained of was the belief that Plaintiff was acting as an AME on specific cases, passing on them as a representative of the Administrator and later appearing at a National Transportation Safety Board hearing on behalf of the pilot as a regular course of conduct. Mr. Powell indicated that this was not an accurate description of Plaintiff's involvement in airmen medical cases and offered to write an explanatory letter. Mr. Marsh agreed that this was a good idea and indicated that, if there was in fact a mistake or misunderstanding, Plaintiff would be redesignated, since good AME's are hard to come by.

9. Mr. Powell followed Mr. Marsh's suggestion by letter dated May 21, 1970 (see Attachment N). Dr. Siegel replied by letter dated June 10, 1970, in which he indicated that Mr. Powell's letter presented no new information that would lead him to renew Plaintiff's designation as an AME (see Attachment O). Except for this letter to Mr. Marsh Plaintiff has been given no opportunity to present his position concerning the charges levelled against him by the Administrator and his authorized representatives, even though those charges have direct bearing on his fitness to perform the duties of an AME and on his professional ethics. Furthermore, Plaintiff has been given no opportunity at all to confront directly the individuals who have formulated these charges and to test their credibility by cross-examination.

10. The mere fact that the Administrator and his authorized representatives are granted discretion to renew or refuse to renew an AME's designation [§ 314(a), Federal Aviation Act of 1958, as amended; § 183.15, Federal Aviation Regulations (14 C.F.R. § 183.15)], is not determinative in this case. No administrative official is granted discretion to act in an arbitrary or capricious manner and the conclusions reached by the Administrator, Dr. Siegel and Dr. Faulkner in this case are arbitrary. Prior to issuing his refusal to redesignate the Plaintiff, Dr. Faulkner failed to advise Plaintiff that his activities were considered improper,

initially failed to apprise Plaintiff of the nature of the charges placed against him, and failed to learn Plaintiff's position on those charges. It is submitted that these failures on Dr. Faulkner's part rendered it impossible for him to make a fair and impartial decision on the question of Plaintiff's redesignation. When reasons for Dr. Faulkner's action were finally obtained from the Administrator and his representatives, they were presented in vague and general terms and included misinterpretations of the facts of this case. Although he has been charged with conflict of interest, to this day Plaintiff does not know exactly on which cases he is supposedly in conflict with the Federal Aviation Administration. Therefore, the rebuttal prepared by Mr. Powell at Mr. Marsh's request must of necessity be inadequate, for he was, and is, unsure of what had to be rebutted. Thus, it was impossible for Dr. Siegel to render fair and impartial reconsideration of Dr. Faulkner's action as he was exposed to only one side of the argument. Plaintiff has not been fully informed as to which of his activities have been considered grounds for the refusal to renew his designation as an AME, nor has he been allowed to adequately present his views concerning those activities. Refusal to renew Plaintiff's designation under these circumstances must perforce be arbitrary and outside the scope of the discretion granted by the Act and the Federal Aviation Regulations.

11. Based on the facts as stated herein, Plaintiff registers the following complaints:

(a) That the Administrator and Dr. Siegel, the Federal Air Surgeon, acting as the designated representative of the Administrator, have established a policy prohibiting designated Aviation Medical Examiners from testifying on behalf of airmen at National Transportation Safety Board hearings; and, that the Administrator and the Federal Air Surgeon have acted in contravention of Section 601(a)(6) of the Federal Aviation Act of 1958, as amended, and Section 552 of the Administrative Procedure Act [5 U.S.C.A. § 552], by establishing a policy and

failing to follow the prescribed procedures for notification of the Plaintiff and other Aviation Medical Examiners of that policy by publication prior to enforcement.

(b) That Dr. Faulkner, Regional Flight Surgeon, under authority delegated by the Administrator, acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. § 15] by arbitrarily refusing to renew Plaintiff's designation as an Aviation Medical Examiner without informing Plaintiff of the charges against him or affording Plaintiff the opportunity to rebut those charges.

(c) That Dr. Siegel, Federal Air Surgeon, under authority delegated by the Administrator, acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. § 183.15] by arbitrarily refusing to renew Plaintiff's designation as an Aviation Medical Examiner, on reconsideration of Dr. Faulkner's action, without affording Plaintiff the opportunity to rebut the charges levelled against him.

(d) That the Administrator, Dr. Siegel, and Dr. Faulkner have acted in contravention of Section 314(a) of the Federal Aviation Act of 1958, as amended, and Section 183.15 of the Federal Aviation Regulations [14 C.F.R. § 183.15] by refusing to renew Plaintiff's designation as an Aviation Medical Examiner as a means of punishing Plaintiff for activities which Plaintiff was never advised were considered improper by the Administrator or his designated representatives.

(e) That the interpretation of the role of the Aviation Medical Examiner exhibited by Dr. Siegel and Dr. Faulkner in their conduct in this matter and

expressed by Mr. Jennings Roberts and the Administrator in regard to expert testimony of Aviation Medical Examiners in hearings before the National Transportation Safety Board has no basis in the statutory authority of Section 314(a) of the Act or in Subpart B of Part 183 of the Federal Aviation Regulations and constitutes an infringment of Plaintiff's constitutionally guaranteed right of free speech by denying renewal of his designation and thus, punishing him for exercising that right.

12. The arbitrary refusals on the part of Dr. Siegel and Dr. Faulkner to renew Plaintiff's designation as an Aviation Medical Examiner has resulted in damage to Plaintiff's financial position and professional reputation. Because he can no longer examine airmen as an AME, Plaintiff has lost a portion of his practice that amounted to approximately $600.00 per year. Further, Plaintiff has been denied the practice of aviation medicine to which he dedicated a great deal of time, effort, and interest over the past eight and one-half years. The scientific interest in aviation medicine which Plaintiff gratified by participation in AME and AME-related programs far outweighed the remuneration he received and constitutes more of a loss to Plaintiff personally than does the loss of income. What is most important, however, is that by the terms of the correspondence attached hereto, the Administrator and his authorized representatives have clearly stated that they question Plaintiff's professional ethics and conduct. Such serious charges should never have been arbitrarily made and opportunity must be afforded to rebut them.

WHEREFORE, UPON THE PREMISES CONSIDERED, Plaintiff respectfully requests that the Administrator exercise the power granted to him by Section 1002(a) of the Federal Aviation Act of 1958, as amended, by compelling Dr. Siegel to renew Plaintiff's designation as an Aviation Medical Examiner, or, in the alternative, that the Administrator conduct an investigation of the circumstances surrounding

Dr. Siegel's and Dr. Faulkner's refusals to renew Plaintiff's designation as an Aviation Medical Examiner by means of an evidentiary hearing at which Plaintiff would have a full opportunity to learn the true nature of the charges against him, to cross-examine witnesses presented by the Federal Aviation Administration, and to present his position concerning this matter through documentary and testimonial evidence.

Respectfully submitted,

Emil P. Taxay, M.D.

By Robert D. Powell

By William H. Roberge, Jr.

His Attorneys

SMITH, PEPPER,
SHACK & L'HEUREUX
1776 K Street, N.W.
Washington, D.C.

July 8, 1970

1119
ATTACHMENT C

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

25 March 1970

Emil P. Taxay, M.D.
The Red-Sunset Building
6915 Red Road
Coral Gables, Florida 33134

Dear Doctor Taxay:

In keeping with the agency's policy of annual evaluation of the Examiner Program, we have reviewed your record of activity as a designatedrepresentative of this agency. The decision has been reached that it would not be in the best interest of the Federal Aviation Administration to re-appoint you as an Aviation Medical Examiner. Accordingly, your appointment which expires this month will not be renewed.

After 30 March 1970, please return to this office your Aviation Medical Examiner identification card, AME Guide, report forms, and any other Federal Aviation Administration material you may have. We will be unable to accept any airman medical examinations performed by you after that date.

We wish to thank you for your past performance that has served the needs of the agency.

Sincerely,

H. W. FAULKNER, M.D.
Regional Flight Surgeon
Aviation Medical Division

GL 1119

ATTACHMENT F

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P.O. BOX 20636
ATLANTA, GEORGIA 30320

10 APR 1970

Robert D. Powell, Esquire
Smith, Pepper, Shack & L'Heureux
700 Montgomery Building
1776 K Street, Northwest
Washington, D. C. 20006

Dear Mr. Powell:

Dr. Faulkner has referred to me for reply your letter of 7 April 1970, concerning Emil P. Taxay, M. D.

In your letter of 6 April 1970, to Dr. Siegel, you indicate your awareness that designation of private persons to act as representatives of the Administrator, under the law and regulations, is purely a discretionary matter.

Pursuant to authority delegated to him, Dr. Faulkner has determined that Dr. Taxay should not be authorized to act as a representative of the Administrator. It is believed that you and Dr. Taxay are aware of the reasons for such determination.

Are we to assume that your letters of 6 April 1970, to Dr. Siegel, and 7 April 1970, to Dr. Faulkner, indicate an intention to challenge legally or otherwise the determination made by Dr. Faulkner?

Very truly yours,

J. N. COKER
Regional Counsel

ATTACHMENT H

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SOUTHERN REGION
P. O. BOX 20636
ATLANTA, GEORGIA 30320

20 APR 1970

Robert D. Powell, Esquire
Smith, Pepper, Shack & L'Heureux
700 Montgomery Building
1776 K Street, Northwest.
Washington, D. C. 20006

Dear Mr. Powell:

Reference is made to your letter of 13 April 1970, concerning Dr. Taxay.

As you are aware, Dr. Taxay, while serving as a designated representative of the Administrator and identifying himself accordingly, has appeared as an expert medical witness in opposition to the position of the Administrator in proceedings before the National Transportation Safety Board.

You have advised Dr. Faulkner that you are using Dr. Taxay as a consultant in opposing the Administrator in contested medical certification cases and there is no doubt about this activity.

Certainly there is no question as to Dr. Taxay's right to serve as consultant to whomever he pleases or to testify for whomever he chooses. However, it is not sensible or appropriate to continue his designation as a representative of the Administrator under the existing circumstances.

The circumstances described above are considered to fully support and justify the determination made by Dr. Faulkner that Dr. Taxay's designation should not be renewed.

Very truly yours,

J. N. COKER
Regional Counsel

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Washington, D.C. 20590

24 Apr. 1970

Emil P. Taxay, M.D.
The Red-Sunset Building
6915 Red Road
Coral Gables, Florida 33134

Dear Dr. Taxay:

This is in response to your letter of 1 April 1970 concerning your designation as an aviation medical examiner. As you know, the designation of aviation medical examiners is discretionary with the Administrator. As an aviation medical examiner you have served as a representative of the Administrator. However, over the past several months you have also testified in behalf of pilots against the Administrator. You have served so regularly as a paid consultant to attorneys opposing the Administrator in particular cases, that, without any reflection on you, it is preferable from this agency's standpoint not to continue you at the same time in the position of an aviation medical examiner, in which you represent the Administrator and assist in carrying out some of the Administrator's authority and responsibility.

We do not challenge your qualifications and we welcome you to continue to provide expert medical opinion in the interest of fairness and justice. We do not feel it would be in the best interests of the Federal Aviation Administration to have you continue as a designated representative of the Administrator.

Sincerely,

P.V. SIEGEL, M.D.
Federal Air Surgeon, AM-1

FEDERAL AVIATION ADMINISTRATION

ATTACHMENT L

WASHINGTON, D.C. 20590

OFFICE OF THE ADMINISTRATOR

16 JUN 1970

Honorable Edward J. Gurney
United States Senate
Committee on Government Operations
Washington, D.C. 20510

Dear Senator Gurney:

This is in reply to your letter of 27 May 1970 concerning Dr. Emil P. Taxay of Coral Gables, Florida. In your letter you set forth a summary of Dr. Taxay's involvement in 20 pilot certification cases handled by a law firm. You consider that Dr. Taxay should be commended for his participation in these cases and not "arbitrarily fired;" and you invite our comments.

Like other government agencies, the Department of Transportation does not permit its employees to take positions adverse to the Department in legal proceedings between the Department and third parties. (Employees may always give factual testimony.) An aviation medical examiner is not an employee, but since he holds a delegation to perform a governmental function on behalf of the Federal Aviation Administration, he is, in this respect, in a position analogous to an employee's. He received a certain amount of training and information and becomes privy to FAA's views on medical facts critical to its decisions. The relationship involves a degree of trust and confidence.

It may well be that sometimes the interest of justice is served by an aviation medical examiner testifying as an expert against the FAA position, but an applicant's interest in justice in his individual case must be balanced against the general interest in justice of the body politic which FAA must represent. It seems to us that in the area of medical certification of airmen as in other areas where individual and public interest often collide, no man can essentially occupy both sides. Furthermore, if aviation medical examiners were generally available as expert witnesses against FAA, litigants would prefer them to experts not connected with the government because of their prestige, which would neither be in the public interest nor in that of other qualified members of the legal profession.

May 21, 1970

John E. Marsh, Esq.
Chief, Special Projects and
Appellate, Branch GC-31
Office of the General Counsel
Federal Aviation Administration
800 Independence Avenue
Washington, D.C.

Dear John:

If you will recall, at our meeting in Mr. Roberts' office on May 8, 1970, you offered me the opportunity of setting forth in writing Dr. Taxay's position in the matter of the decision of Dr. Faulkner not to redesignate Dr. Taxay as an Aviation Medical Examiner. There may be a material misunderstanding on this subject so I thank you for this opportunity to square the record.

As I expressed during our meeting, Dr. Taxay is a competent, honorable, professional and highly ethical physician. He has been an Aviation Medical Examiner for nine years, and his competence and professional judgment have never been questioned. During this period of time he has developed medical files that have resulted in either the certification or ultimate denial of many airline pilots.

Dr. Taxay became known to this office in a limited way on December 19, 1968. He was the physician of an airline pilot I had represented in the past, William S. Ewing. I had abandoned Mr. Ewing on the facts I had available in early 1968. Mr. Ewing and Dr. Taxay wanted to know if there was a chance to obtain a certificate for Mr. Ewing if certain additional testing was accomplished. I evaluated the proposal (one for arteriography and cardiac metabolism testing) and informed Mr. Ewing that if he were willing to undergo the tests and risks involved, I would be happy to look at the

case again upon their completion. On April 15, 1969, after completion of testing, Dr. Taxay acting as an AME performed an examination on Mr. Ewing for a first class certificate, but declined to issue the certificate because of an abnormal electrocardiogram indicating Left Bundle Branch Block. The information relative to the testing Mr. Ewing had undergone and his entire case history was developed into a protocol, and furnished to Dr. Faulkner along with the first class examination. Dr. Taxay did not consult me as to whether or not he should perform a first class physical examination on a pilot after developing information pertinent to him. He did not think it improper not to issue the certificate, and then urge in a separate document that one be issued. He was never advised that this would be considered an impropriety, or in fact was considered an impropriety.

Dr. Taxay testified at the hearing on this matter on October 8, 1969, and consulted with me to its conclusion. As you know, we are all awaiting Examiner Fowler's decision. During the legnth of his participation, Dr. Taxay was not advised that he was acting improperly. The position he took was that of an expert, but his testimony did not vary substantially in its conclusion from that of Dr. Westura, e.g., that Mr. Ewing should be permitted a certificate that would enable him to function in some flight training capacity.

Dr. Taxay's situation *vis a vis* Mr. Ewing is therefore summarized as follows: Mr. Ewing was his patient. Dr. Taxay reviewed his files and saw that further testing might help his patient resume some aspect of his livelihood. He had this information developed hoping that he would find agreement at the Federal Air Surgeon's office. The AME examination was only a vehicle to having the case reconsidered in light of the new information. It is significant that as an AME Dr. Taxay did not issue a certificate but placed the matter in the hands of the Federal Air Surgeon, even though he did believe some form of a certificate should be issued. There is clearly no bad faith on his part on this point.

I submit further that Dr. Taxay's appearance and consultation on the Ewing case is equally blameless. The beginnings of the case necessitated an AME, and because of his professionalism Dr. Taxay played that role in accordance with the guide furnished him. After the Federal Air Surgeon denied Mr. Ewing, Dr. Taxay's participation was an examining physician and consultant, not AME. Had he not acted as AME in the matter, there would not even be the slightest reason to suspect his ethics, though in acting as AME, he was ethical as the record will bear out. It certainly cannot be said that a doctor, who is an AME, and so acts on many cases, may not be permitted to consult or act as an expert on a case in which he plays no part as physician for the Government. We do not intend here to admit, therefore, that a conflict of interest exists under these circumstances, but because the problem has arisen, and because of the warning that Dr. Taxay has received by way of the development of the factors leading to the refusal to redesignate, he is now on notice that this practice is unacceptable to FAA. As such, Dr. Taxay is perfectly willing to comply with FAA's wishes in this area, if it will heop to resolve the difficulty.

Well after the beginning of Dr. Taxay's involvement in Mr. Ewing's situation, I had sent him some cases to review. I had done so because I was in need of medical expertise, and because of the very impressive job Dr. Taxay was doing in factually developing the Ewing case. He did not act as AME on them, he served merely as an consultant. He has acted as AME on two and has not served as a consultant. An example of such a case is the Joseph Burrell case, currently before NTSB. The reason for Mr. Burrell's referral to Dr. Taxay for an AME work-up was that Mr. Burrell had moved into the Miami area after he became my client. He asked if I knew an AME in the area, and knowing that Dr. Taxay was competent and qualified, I recommended Dr. Taxay. Dr. Taxay's work-up of Mr. Burrell should be available to you. He had Mr. Burrell obtain opthomologist tests, and head x-rays before considering him for a certificate. Dr. Taxay ultimately denied Mr. Burrell. The other example of

a case in which Dr. Taxay acted as AME is K.D. Wright, to be considered below.

Dr. Taxay has participated in five (5) cases as a consultant in which the airman was certified by either Dr. Siegel or the Panel. In eight (8) cases, he participated as a consultant and advised me to drop the cases as the pilots should not be certified and should not fly. He has testified in two (2) cases, Ewing and Shrage. He was a consultant only in Shrage. The Ewing matter was developed largely before he began to advise me on certain other cases. Dr. Taxay has acted as a consultant on a case currently before the NTSB—that of Piche. He was the AME on the case, and will probably testify.

Dr. Taxay has been accused by Dr. Faulkner of acting as consultant to me on a case which he knew that the Administrator would not be in favor of the pilot returning to duty. The case is K.D. Wright. Dr. Taxay has not acted as a consultant on this case. It is a psychiatric case. Dr. Taxay is an internist. What he did was give Captain Wright a first class physical, and look over this past record to ascertain whether there was cause for denial. He found such cause in the fact that Captain Wright had previously been denied, and accordingly denied him. In order to develop information concerning the reasons for the past denial, Dr. Taxay, a licensed pilot, flew with Captain Wright, having on board a psychiatrist, and a nurse to take blood pressure readings. This was the extent of his participation and it was accomplished to aid the Federal Air Surgeon in evaluating the alleged "fear of flying" in Captain Wright. No criticism was levelled at Dr. Taxay for this action at the time he acted. Dr. Taxay has done much the same thing by way of extra stress testing at the request of Oklahoma City on numerous cardiovascular cases after turning down the pilot. It is much the same as asking for an audiogram in the case of a pilot having hearing problems. If Dr. Taxay testifies at the Wright hearing, it will be under subpoena. Dr. Faulkner's allegation that Dr. Taxay has acted *contra* to a known decision

of the Administrator is without foundation. First, as the matter is still in the hands of the Region, there has currently been no decision of the Administrator. Secondly, Dr. Taxay has not acted *contra* to the Administrator. He turned Captain Wright down, even after having performed a pertinent flight test. Moreover, Dr. Norwood, at FAA indicated to me in a meeting that the Wright case would be reconsidered by FAA if there was a change in Captain Wright's life-style or status. As for consultation on the case, my consultants are Dr. Philip B. Phillips, Dr. Lucio Gatto, and Dr. Irving A. Fosberg, Ph.d. None of these gentlemen know or have spoken to Dr. Taxay.

The outline of Dr. Taxay's involvement is not extensive. It is impressive to note that in most of the cases on which he has acted as a consultant, the cases have been dropped. In five (5), the pilots have been certified by either Dr. Siegel or the Panel. Therefore, in the vast majority of the cases he has acted upon, the best interest of the public has been realized. He has testified at two hearings, and did the AME work-up on only one of these, although not certifying the pilot though he believed there should be certification. He was not advised at any time that he was in a conflict situation, nor did he act in such a manner that would render him guilty of such a charge. It is unfortunate that Dr. Taxay did the workup on Ewing, but there was no bad faith involved. He has never acted in a way that could be called unethical. His disagreements with the Administrator have always been within the framework of the Regulations. More cannot be asked of a scientist/physician.

We request, on behalf of Dr. Taxay, that these facts be made known to Dr. Siegel. Dr. Taxay should be allowed to remain as an AME, as he is a good one. You need only check with Oklahoma City to verify that fact. If he is allowed to remain, you have my word, and Dr. Taxay's, that he will not appear as an expert in a case of a pilot on whom he has performed the examination of a designated Aviation Medical Examiner if such examination is prefatory

to a denial of a certificate by the Federal Air Surgeon, unless subpoenaed. It is believed that this commitment on Dr. Taxay's part, while not necessary from the point of view of Dr. Taxay's ethics, should serve to allay any doubts that the Federal Air Surgeon may have concerning Dr. Taxay's activities.

Very truly yours,

Robert D. Powell

cc: The Honorable Herman Talmadge
The Honorable Richard L. Ottinger
The Honorable Spessard L. Holland
The Honorable Edward J. Gurney
The Honorable Fletcher Thompson
The Honorable Dante Fascell

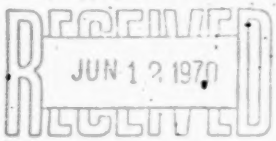
RDP/pat

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ATTACHMENT O

WASHINGTON, D.C. 20590

Smith, Pepper, Shack & L'Heureux



10 JUN 1970

Mr. Robert D. Powell
Smith, Pepper, Shack and L'Heureux
Attorney at Law
700 Montgomery Building
1776 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Powell:

Your letter of 21 May 1970 addressed to Mr. John A. Marsh, Chief, Special Projects and Appellate Branch, GC-32, has been referred for reply. I have reviewed your letter and find no new information which would lead me to designate Dr. Emil P. Taxay as an Aviation Medical Examiner for the Federal Aviation Administration at this time.

Sincerely,

P. V. Siegel M.D.

P. V. SIEGEL, M.D.
Federal Air Surgeon, AM-1

SUPREME COURT, U. S.

No. 71-1041

Supreme Court, U. S.
FILED
MAR 24 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

EMIL P. TAXAY, M.D., PETITIONER

v.

JOHN H. SHAFFER, Administrator of the Federal Aviation Administration, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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EMIL P. TAXAY, M.D., PETITIONER

v.

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The Federal Aviation Act empowers the Administrator of the Federal Aviation Administration ("FAA") to delegate to private persons his statutory responsibilities concerning the examination, inspection and testing of applicants for airman certificates. Under the Act, the Administrator "may rescind" any such delegation "at any time and for any reason which he deems appropriate." 49 U.S.C. 1355(a).

In 1961, the Administrator appointed petitioner, a private physician, as an Aviation Medical Examiner ("AME"), authorized to examine airmen and issue medical certificates. By its terms, the appointment

expired annually, but was subject to renewal each year at the FAA's discretion (14 C.F.R. 183.15(b)).

In 1970, the FAA's Regional Flight Surgeon advised petitioner that it had been determined that his reappointment "would not be in the best interest of" the FAA; petitioner was notified that "your appointment which expires this month will not be renewed" (Pet. App. 13c). On request of petitioner's counsel, the FAA stated as reasons for its decision petitioner's recent service as a regular consultant to an attorney representing pilots having difficulty obtaining FAA certification, and his testimony before the National Transportation Safety Board on behalf of pilots who had been denied FAA certificates (Pet. App. 15c-17c).

Petitioner then filed a "complaint" with the Administrator (Pet. App. 2c-12c), challenging the FAA's refusal to reappoint him and demanding an investigation. The matter was referred to a separate office within the FAA "unrelated to either the Office of Aviation Medicine or the Office of the General Counsel" (Pet. App. 1c). Based on that office's "independent evaluation and recommendation" (*ibid.*), the FAA "concluded that there does not exist any reasonable basis for reversal of the decision * * * not to redesignate [petitioner]" (*ibid.*).

Petitioner then sought review of the Administrator's decision in the United States Court of Appeals for the District of Columbia Circuit, pursuant to 49 U.S.C. 1486. That provision prescribes that "[a]ny order, affirmative or negative, issued by the * * * Administrator under this chapter [with an exception not rele-

vant here] * * * shall be subject to review by the courts of appeals * * * upon petition * * *." 49 U.S.C. 1486 (a). The court of appeals, relying on its recent decision in *International Navigators Council of America* v. *Shaffer*, 444 F.2d 904 (C.A.DC.), dismissed the petition "for lack of jurisdiction" (Pet. App. 1a-2a).

Petitioner contends here, as he did below, that the decision of the Administrator not to redesignate him was, in effect, a reviewable "order" within the meaning of 49 U.S.C. 1486.[1] We do not agree.

The statutory provision in question is intended only to cover action taken by the Administrator when acting in a quasi-judicial capacity. Under the Federal Aviation Act, an "order" may be entered, after notice and a hearing, to compel airmen, air carriers, and other persons to comply with the Act or the regulations promulgated thereunder (49 U.S.C. 1482(c)). The order must "set forth the findings of fact upon which it is based, and * * * be served upon the parties to the proceeding and the persons affected by such order." 49 U.S.C. 1485(f). If supported by substantial evidence, the findings of fact shall be conclusive. 49 U.S.C. 1486 (e). Congress, in giving the courts of appeals jurisdiction to review directly certain action of the FAA Administrator, spoke only in terms of "orders," containing "findings of fact," entered in a quasi-judicial proceeding (49 U.S.C. 1486(a)); as the court below held in

[1] Petitioner does not now claim that the adverse decision with respect to his "complaint" is a reviewable "order" under 49 U.S.C. 1486 (Pet. 6). That argument was expressly rejected by the District of Columbia Court of Appeals in *International Navigators Council of America* v. *Shaffer*, *supra*.

National Business Aircraft Association, Inc. v. *Volpe*, C.A.D.C., No. 22,636, decided April 22, 1969, it was not the legislative intent to provide for direct court of appeals review of the Administrator's exercise of his quite separate regulatory functions, such as the issuance of regulations and rules, or the setting of safety standards.

Nor did Congress intend in 49 U.S.C. 1486(a) to provide for direct court of appeals review of the internal, administrative determinations of the Administrator relating to the appointment of a private physician to act as his representative in issuing medical certificates to airmen. The "delegation" provision of the Act (49 U.S.C. 1355(a)) expressly states that the Administrator may delegate his powers and duties to private persons "subject to such regulations, supervision and review as he may prescribe"; and the Act provides that he "may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate." Unlike his authority to enter "orders," the Administrator is not required by the "delegation" provision to condition his appointment decisions on a quasi-judicial hearing; nor is there any requirement that his determination be supported by "findings of fact." No matter how one characterizes his exercise of authority in this area, the Administrator has not, by refusing to renew an annual appointment, entered an "order" within the meaning of the statutory review provision. Accordingly, the court of appeals properly held that it lacked jurisdiction in the present

case. See *International Navigators Council of America* v. *Schaffer, supra.*[2]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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[2] Petitioner also contends that the courts of appeals "rejected" his argument that the Administrator's refusal to renew his appointment without a hearing was a violation of due process of law. But, since the case was decided below on jurisdictional grounds, the due process question was never reached. At all events, petitioner's constitutional claim is insubstantial. As this court stated in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government[al] function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required" (footnote omitted). Such a characterization covers the Administrator's decision not to renew petitioner's appointment. See, *e.g.*, *Medoff* v. *Freeman* 362 F.2d 472, 475 (C.A. 1); *Jaeger* v. *Freeman*, 410 F.2d 528, 531 (C.A. 5).

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